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OCTOBER TERM, 1976

KAKE-TV AND RADIO, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 537 F. 2d 1121. The memorandum opinion and order of the Federal Communications Commission (Pet. App. 6a-16a) are reported at 54 F.C.C. 2d 173.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 1976. The petition for a writ of certiorari was filed on October 7, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Communications Commission properly applied its cable television (CATV) regulatory policies when it issued a certificate of compliance to a CATV operator franchised by a city, upon concluding that

the franchise was valid on its face and that certain alleged violations of state law in issuance of the franchise were outside the scope of its review of state franchise actions.

STATEMENT

The federal regulatory scheme for cable television (CATV) involves full and preemptive federal regulation in some areas and substantial deference to state and local authorities in other areas. *Cable Television Report and Order*, 36 F.C.C. 2d 143, 207-210; *Clarification of Cable Television Rules*, 46 F.C.C. 2d 175, 188-189. The Federal Communications Commission issues certificates of compliance to CATV systems. An applicant for a certificate must demonstrate compliance with federal rules for CATV operations, such as those governing signal carriage and access channels. However, the Commission has left to the States the initial decisions whether to allow cable television at all and which operator to select. *Clarification of Cable Television Rules, supra*, 46 F.C.C. 2d at 189.

The Commission's review of state authorizations, which are often in the form of a franchise, is limited. The Commission examines an applicant's representations concerning the validity of its local authorization and the comments of interested parties only to determine if the proposed operations have been authorized by local law pursuant to the minimum procedural steps the Commission requires. *Id.* at 190. This case arises out of proceedings in Kansas leading to the grant of a CATV franchise and the Commission's determination that the franchise is valid.

On September 20, 1966, the City of Wichita, Kansas, adopted Ordinance 28-882, which set forth requirements for obtaining a cable franchise. AirCapital Cablevision, Inc., and three other companies applied for franchises. While these applications were pending, Community TV

of Wichita, Inc., filed suit seeking to have Ordinance 28-882 declared invalid. The Kansas trial court upheld Wichita's authority to pass the ordinance and grant a franchise, but found two provisions of the ordinance to be invalid. Community TV appealed this decision to the Kansas Supreme Court. *Community Antenna TV of Wichita v. City of Wichita*, 205 Kan. 537, 471 P. 2d 360.

During the pendency of the appeal, the City of Wichita enacted Ordinance 30-413, granting a CATV franchise to AirCapital, effective April 5, 1969. The Kansas Supreme Court subsequently ruled that Ordinance 28-882 was void in its entirety because it unlawfully interfered with private business affairs. *Community Antenna TV of Wichita v. City of Wichita, supra*. Wichita therefore repealed Ordinance 28-882, but it did not repeal Ordinance 30-413 since it had not been at issue in the appeal. *KAKE-TV and Radio, Inc. v. City of Wichita*, 213 Kan. 537, 538, 516 P. 2d 929, 930.

In conjunction with its repeal of Ordinance 28-882, the City of Wichita began proceedings to amend Ordinance 30-413. Community TV attempted to have the city held in contempt of the court's mandate due to its proceedings to amend Ordinance 30-413, but the trial court dismissed the contempt citation. Wichita then moved to have the trial court rule that passage of the proposed amending ordinance would not violate the court's mandate. The trial court denied this motion, and Wichita appealed to the Kansas Supreme Court on December 18, 1970. *Community Antenna TV of Wichita v. City of Wichita*, 209 Kan. 191, 193, 495 P. 2d 939, 940.

While the latter appeal was pending, the Kansas legislature authorized cities to grant cable franchises and ratified all existing ordinances purporting to authorize CATV service. Kansas Stat. Ann., 12-2001 *et seq.* (1964). The Federal Communications Commission also

adopted while the appeal was pending its comprehensive CATV regulations. *Cable Television Report and Order, supra*. As a result of these developments, the Kansas Supreme Court vacated its decision in the first appeal and upheld the original trial court ruling that Ordinance 28-882 was valid. *Community Antenna TV of Wichita, Inc. v. City of Wichita*, 209 Kan. 191, 495 P. 2d 939.

Following this decision, the City of Wichita, on August 29, 1972, adopted Ordinance 32-325, which amended Ordinance 30-413. AirCapital thereafter accepted the franchise offered by Wichita and applied to the Commission in October 1972 for a certificate of compliance (see Pet. App. 16a).

On November 22, 1972, KAKE-TV filed suit in the Kansas courts seeking a judgment declaring Ordinance 32-325 invalid. The trial court held that the ordinance was valid on its face and dismissed the action on the ground that KAKE-TV lacked standing to raise the issue. On December 8, 1973, the Kansas Supreme Court affirmed the trial court's dismissal for want of standing. It held that (1), under state law, a franchise granted by a city is not subject to collateral attack by a private party absent a showing that such party has a special interest or suffers some peculiar injury distinct from that of citizens generally, and (2) KAKE-TV had not established either special interest in the subject matter of the challenged franchise or peculiar injury. At the same time, the court noted that KAKE-TV had interposed objections to AirCapital's franchise in the pending Commission proceedings on AirCapital's application for a certificate of compliance and it assumed that those objections would be given "due consideration." *KAKE-TV and Radio, Inc. v. City of Wichita, supra*.

KAKE-TV previously had filed a petition requesting the Commission to deny AirCapital's application for a certificate of compliance on the ground that AirCapital's

franchise was invalid under Kansas law. The crux of its objection was that a city in Kansas may not issue a cable franchise unless it has enacted both an ordinance granting the franchise and an ordinance authorizing the city to grant franchises, and that the Wichita ordinances granting the franchise had not been enacted pursuant to a valid enabling ordinance.¹ AirCapital and the City of Wichita opposed KAKE-TV's petition (Pet. App. 10a, 12a).

The Commission denied KAKE-TV's petition and granted AirCapital a certificate of compliance (Pet. App. 6a-13a). With respect to the validity of AirCapital's franchise, the Commission reiterated its policy of not considering disputes involving local law and determined that the following factors provided sufficient evidence of the franchise's validity for Commission purposes: (1) Ordinance 30-413 had never been the subject of litigation; (2) the City of Wichita had taken the position that the Ordinance was valid; and (3) the Kansas legislature had enacted legislation validating all pre-existing ordinances or franchises (Pet. App. 10a-11a).²

The court of appeals unanimously affirmed the Commission's decision (Pet. App. 1a-5a). The court held that the Commission had developed fully the facts relevant to determining compliance with the limited federal requirements on the franchising process, and that the

¹KAKE-TV also claimed that AirCapital had received its franchise as the highest bidder and that such criterion was unlawful under Kansas law. Further, it questioned the effective date of AirCapital's franchise, assuming that there was a valid franchise (Pet. App. 9a).

²The Commission also ruled that the franchise was in substantial compliance with the Commission's regulations of franchise fees and was not in violation of its cross-ownership rules (Pet. App. 10a, 12a).

Commission properly had refused to decide KAKE-TV's claims under state law. The court noted that if there were some defect in the franchise not revealed in the filings before the Commission, the Kansas courts, and not the Commission, were the proper forum to resolve the issue (Pet. App. 4a-5a).

ARGUMENT

The court of appeals' decision is correct, does not conflict with other judicial decisions, and presents no issue of general importance warranting review by this Court.

Petitioner contends that the federal interest in maintaining a uniform national cable television policy will be jeopardized unless the Commission is required to decide whether the award of a franchise to AirCapital by the City of Wichita was valid under Kansas law. This argument is based on a misunderstanding of the Commission's dual jurisdiction policy.

That policy leaves to the discretion of state and local authorities the decisions whether and how to authorize local CATV operations—provided certain minimum federal guidelines, such as public participation in the granting process, are satisfied. The Commission also leaves to local authorities the selection of franchisees and enforcement of franchise provisions and consistently has refused to consider issues of state law governing cable franchising.³ Absent extraordinary circumstances, such as evi-

³*General Communications & Entertainment, Inc.*, 41 F.C.C. 2d 501, rehearing denied, 45 F.C.C. 2d 309; see also *Metropolitan Cablevision Corp.*, 34 P & F Radio Reg. 2d 1159; *Blue Ridge Cable Television, Inc.*, 34 P & F Radio Reg. 2d 1423.

Petitioner cites *Pottsville Broadcasting Co. v. Federal Communications Commission*, 98 F. 2d 288 (C.A. D.C.), and two decisions of the Commission for the proposition that the Commission has a practice of interpreting state law (Pet. 14). None of

dence that the franchise was obtained through fraud or corruption, the Commission presumes that franchises issued by state or local authorities conform to state law and are the result of regular official action. This policy is consistent with the Commission's regulatory authority over CATV operations. See *United States v. Midwest Video Corp.*, 406 U.S. 649.

The Commission's application of that presumption in the present case was strongly supported by the facts the Commission found. No Kansas judicial opinion, legislative enactment or administrative ruling has invalidated the City of Wichita's ordinance granting a CATV franchise to AirCapital (Pet. App. 10a). In 1972 the Kansas legislature validated all pre-existing franchises and enabling ordinances (Pet. App. 11a). Moreover, the City of Wichita, the local governmental entity immediately involved, formally advised the Commission that the franchise is valid (Pet. App. 10a).

In these circumstances, and absent persuasive contrary evidence, the Commission was entitled to apply its normal presumptions of official regularity and lawfulness. As the court of appeals observed, the record before the Commission revealed no defect in the franchise and the Commission's treatment of state law was adequate and fair (Pet. App. 4a).

Petitioner contends that the Commission nevertheless was obliged to rule upon the validity of the franchise because the Commission is "the only forum in which

the cases relied upon by petitioner supports the proposition. Those cases, in any event, deal with broadcast licenses, over which the Commission has plenary and exclusive regulatory authority—which it does not have with respect to CATV operations.

that question can be determined" (Pet. 13). The Commission is not the only such forum. As the court of appeals noted, "the matter can be decided in the Kansas courts between the proper parties" (Pet. App. 4a-5a).

Finally, the decision below is consistent with the decision of the District of Columbia Circuit in *Teleprompter Cable Systems, Inc. v. Federal Communications Commission*, No. 75-1582, decided August 26, 1976. In *Teleprompter*, a franchisee had bribed city officials in order to obtain a franchise and the Commission consequently refused to grant the franchisee a certificate of compliance. The court recognized the limited nature of the Commission's general policy in this area, which it described as the "normal standard of non-review" of local franchising decisions (slip op. 9, 12, 15). But it upheld the Commission's authority to consider the validity of a franchise when confronted with evidence of corruption or fraud in the franchising process (*id.* at 9, 13). Thus, despite petitioner's assertion that *Teleprompter* "is in conceptual conflict" with the decision below (Pet. 10), the present case involves simply the application of the Commission's general standard of non-review whereas *Teleprompter* was within the exception to that standard for circumstances involving fraud and corruption.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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